Supreme Court, U.S.
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No. 02- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER LETTERESE & ASSOCIATES, INC.,

Petitioner,

v.

DANIEL DASHMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a trial court infringe upon a party's procedural due process rights under the United States Constitution where said court deprives that party of its discovery rights and dismisses an action seeking declaratory relief before issue has been joined where there are material issues of disputed fact necessary to the determination of that action?

PARTIES TO THE PROCEEDING

Petitioner, Peter Letterese & Associates, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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The opinion of the New York State Appellate Division, Second Department is reported at *Peter Letterese & Assocs. v. Dashman*, 296 A.D.2d 448, 744 N.Y.S.2d 897 (2nd Dept. 2002) (App. 1a-3a).

STATEMENT OF JURISDICTION

The decision of the New York State Appellate Division, Second Department was entered on July 8, 2002 and a timely Motion for Leave to Appeal was denied by the New York Court of Appeals on November 21, 2002. The federal question was raised as indicated at p. 16a, *infra.*

This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1 provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

This case involves the deprivation of the procedural due process rights of the Petitioner under the Fourteenth Amendment to the United States Constitution by the trial court. This deprivation took place through the court's

dismissal of Petitioner's complaint seeking declaratory relief before issue was ever joined where there were material issues of disputed fact and the plaintiff was not permitted to engage in discovery.

Petitioner and its attorney, Richard A. Marcus, were in fact sanctioned in the combined total of $10,000 for bringing the declaratory relief action on grounds that it was frivolous because the trial court found that Appellant was seeking to re-litigate previously determined issues. Even though the appellate court found that the two actions were not necessarily related, it nevertheless affirmed the award of sanctions and directed the trial court to issue a declaratory judgment. This declaratory judgment however, should not have issued until all of the material factual issues had been resolved. The case should have been remanded for the trial court to permit the parties to engage in discovery and resolve all of the material disputed facts before issuing a declaratory judgment.

1. THE PRIOR ACTION

Because prior proceedings are related to the instant action, a brief summary of those proceedings is appropriate. The prior action was commenced by Appellant (and two individual plaintiffs) on or about July 19, 1999, in the Supreme Court of New York, County of Westchester, before the Honorable Nicholas J. Colabella, the same Judge as the Trial Court in the instant action.

The Prior Action sought declaratory and injunctive relief that would enjoin the Respondent, Daniel Dashman (the Respondent herein) from revealing, divulging, or otherwise disclosing any confidential or secret information

which he obtained while acting as the attorney for Appellant without first demonstrating to the court that the information to be divulged or revealed was necessary to establish or collect his fee or to defend himself against an accusation of wrongful conduct. *See* Appellant's Brief (hereinafter "AB") at pp. 6-11.

The Prior Action resulted in a permanent injunction, which was granted by the court pursuant to stipulation between the parties. That action was dismissed with the exception of enforcement of the permanent injunction. Record (hereinafter "R") at 19. As part of the settlement agreement, Respondent was supposed to provide Petitioner with certain information and documents relating to Respondent's dealings with the Church of Scientology.

After a dispute arose regarding Respondent providing this information, Respondent submitted a proposed affidavit that was to be executed by Respondent stating that in October of 1999 (after execution of the settlement agreement), Respondent received a call from the International Justice Chief of the Church of Scientology, Mike Ellis, who was inquiring into the status of the lawsuit between Respondent and Petitioner. The affidavit avers that upon inquiry from Mr. Ellis regarding the status of the lawsuit, Respondent read a statement from the settlement agreement pertaining to Respondent's obligations with respect to inquiries made by persons regarding the lawsuit. *See* Prior Action Record (hereinafter "PAR") at 84.

The unsolicited affidavit also indicated that in November of 1999, the Respondent received another telephone call from the Office of Special Affairs International of the Church of Scientology asking who had held the copyright to a book by

Les Dane entitled "Big League Sales Closing Techniques". (PAR 84). Apparently, the caller was interested in obtaining the rights to the copyrighted material. The Respondent was the attorney who had drafted the contract between Peter Letterese & Associates, Inc. and the Dane Estate for the copyrighted material as he was its attorney in 1994.

According to the Respondent, he told the caller that all of his dealings with any of the works of Mr. Dane were as an attorney for a client and that the information was privileged. (PAR 84).

After learning that these conversations had taken place six months earlier, and not believing that the telephone calls were as limited as Respondent suggested, by notice of motion dated June 8, 2000, the Appellants in the Prior Action made an application to the court to have the deposition of the Respondent taken. The principal purpose of the deposition was to find out what had transpired during the two telephone conversations.

The motion was made to preserve judicial resources and time. Since the court in the prior action was already policing Dashman's ethical responsibilities anyway, Petitioner reasoned that the most effective and expeditious way to resolve this problem as to the nature and extent of the conversations was to ***request permission*** to make the motion. If permission was granted, the motion would be made.

To that end, Appellant's counsel called Judge Colabella's clerk, obtained permission to make a motion to have the Respondent's deposition taken, explained to the clerk that this was the purpose of the motion, and then made the motion which was opposed by Respondent. R at 61-70.

By Order dated July 25, 2000, Judge Colabella denied Appellants' motion to take the Respondent's deposition regarding these telephone conversations and indicated that the relief requested had nothing to do with the permanent injunction issued by the Court. *See* Appendix "C ". The court awarded sanctions in the amount of $750 against Appellant in noting that its conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law". R at 84-86. The court specifically acknowledged that the action had been dismissed except as to enforcement of the permanent injunction and indicated that permission was granted to make the motion based upon its understanding that it related to the judgment but that the motion did not relate to the judgment. The court found that the Appellant had failed to cite any ethical canon or rule that would require the Respondent to inform the Appellant of a potential business opportunity in the absence of an ongoing attorney client relationship. The court also held that the obligation which the Appellant contended the Respondent owed them was inconsistent with the parties' settlement agreement.

Appellant appealed and by decision decided December 17, 2001 the Appellate Division, Second Department affirmed the decision indicating that the trial court providently exercised its discretion in imposing monetary sanctions. R at 84-86. That decision was reported as *Letterese v. Dashman*, 289 A.D.2d 378, 734 N.Y.S.2d 877 (2001).

2. THE UNDERLYING PROCEEDING

The underlying proceeding was then commenced by the Petitioner seeking a declaratory judgment which determined the specific issue as to whether or not, as a matter of law, an attorney owes a duty to his former client to apprize the former

client that the attorney had asserted the attorney-client privilege on the former client's behalf. R at 10-17.

The action was commenced because the court in the prior action was never squarely asked to decide whether a duty was owed. The closest the court came to actually deciding in the prior matter the issue at stake in this matter was to state that Appellant had not cited any ethical canon or rule to support the claim that an attorney has an obligation in the absence of an on going attorney client relationship to inform Appellant of the potential business opportunity. R at 85.

In this action, Appellant contended for the first time that the duty arose by virtue of operation of law due to an attorney's continued duty of openness and conscientious disclosure which survives the termination of the attorney/ client relationship as enunciated by the New York Court of Appeals in *Sage Realty Corp . v. Proskauer Rose Getz & Mendelsohn, LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997) (R at 136).

Appellant logically reasoned that because no one would dispute the fact that an attorney has a continuing obligation after termination of employment to assert the attorney client privilege on the former client's behalf, it is only a logical extension of that argument that the attorney should inform the client when this privilege has been asserted.

The second independent basis for the duty asserted was by virtue of the confidential settlement agreement of the parties which required the Respondent/Defendant to inform the Appellant of "any and all attempts to compel information related to the settlement agreement".

Research revealed that the trial court in the prior action was not a court of competent jurisdiction to grant the relief requested as a final judgment had already issued and, with the exception of enforcement of the permanent injunction, the case had been dismissed. Thus, any legal or factual determinations made by the court could not have a res judicata or collateral estoppel effect in another action, even if Plaintiff had requested affirmative relief. *See* Plaintiff's Brief at pp. 15-24 & R at 138-140. Indeed Appellant believed it was originally sanctioned because the court did not have jurisdiction to grant the requested relief. Because the court itself lacked jurisdiction to grant the relief requested, any findings made were mere dicta. R at 134-141.

In addition, Appellant contended that the release and settlement agreement could not cut off this duty just as it could not cut off the duty for the Respondent to assert the attorney client privilege after termination of the relationship. Indeed, the permanent injunction itself required the Respondent to continue to act as an ethical attorney.

The Respondent read from the settlement agreement when he asserted the attorney client privilege on Appellant's behalf. Obviously the Respondent believed both callers were attempting to obtain information pertaining to the settlement agreement. In other words, the Respondent believed that the callers were attempting to compel information relating to the settlement which triggered the Respondent of his own compulsion to retrieve the agreement, assert the attorney client privilege and read verbatim that portion of the agreement covering attempts to obtain information about the settlement.

At least two material question of facts existed. The first question was the subjective intent of *both* parties in using the disputed language, "any and all attempts to compel information". The second question of fact was whether the callers were seeking to compel the information. *See* Appellant's Reply Brief (hereinafter ARB) at 7-9.

The Defendant-Respondent responded to the underlying action on or about October 6, 2000 by moving to dismiss the complaint and seeking sanctions against Appellant and its counsel as well as permanent injunction precluding Appellant from commencing any action against Respondent with respect to the claims raised in the instant and prior actions. R at 22-133.

That motion was granted by a decision/order/judgment filed and entered on December 4, 2000. R at 4-8. The trial court found that: 1) Appellant made the same claim and sought the same identical relief in the prior action; 2) that prior determination foreclosed re-litigation in the instant action; 3) Appellant's conduct was frivolous because it elected to re-litigate previously determined issues in a new action; and 4) injunctive relief was proper.

The Plaintiff then appealed from that decision/order/ judgment to the Appellate Division, Second Department.

3. APPELLATE COURT PROCEEDINGS

By Decision and Order dated and entered July 8, 2002, the decision of the trial court dismissing the complaint and sanctioning counsel was unanimously affirmed. The appellate court oddly affirmed the award of sanctions even though it expressly found that the trial court had erred

in relying on the doctrine of collateral estoppel as the dismissal of the earlier action did not necessarily decide the issues raised in the instant action.

Note that the basis for the trial court's award of sanctions was that Appellant sought to re-litigate previously decided issues. The appellate court also found that the trial court should have directed entry of a judgment declaring that the Respondent did not breach his fiduciary duty owed to Petitioner.

4. NEW YORK COURT OF APPEALS REVIEW AND RAISING OF FEDERAL QUESTION

Petitioner then timely sought review from the New York Court of Appeals, who denied the motion for leave to appeal without opinion or other explanation. In the Motion, Petitioner squarely raised the constitutional issues presented by this Petition. At page 2, the third question presented raises the issue of whether a court can issue a declaratory judgment when there is a dispute as to the ultimate facts underlying the dispute.

At page 13, paragraph 59, Petitioner also states:

> It would be a deprivation of Appellant's Due Process rights under the Fourteenth Amendment of the United States Constitution and the New York constitution for the Court to determine that no duty was owed before an answer had even been filed where Appellant was not permitted the opportunity to engage in discovery.

REASONS FOR GRANTING THE PETITION

A FEDERAL QUESTION OF SUBSTANTIAL IMPORTANCE IS PRESENTED BY THIS PETITION WHICH HAS NOT HERETOFORE BEEN DECIDED AS TO WHETHER THE DUE PROCESS CLAUSE PERMITS A COURT TO ENTER A DECLARATORY JUDGMENT BEFORE A CASE IS AT ISSUE WITHOUT AFFORDING THE PARTIES ANY RIGHT TO DISCOVERY WHERE MATERIAL QUESTIONS OF FACT EXIST NECESSARY TO THE DETERMINATION OF THE DISPUTE.

I. THE COURT COULD NOT HAVE ISSUED A DECLARATORY JUDGMENT UNTIL ALL OF THE MATERIAL DISPUTED FACTS HAD BEEN ASCERTAINED.

New York Civ. Practice Law & Rules (hereinafter "CPLR") § 3001 permits the trial court to render a judgment determining the rights and other legal relations of the parties. It is generally recognized that there is no inherent limitation in the remedy of a declaratory judgment which would prevent its widest possible use. *Maguire v. Monaghan*, 206 Misc. 550, 134 N.Y.S.2d 320 (Sup. Ct. N.Y. 1954), *aff'd*, 285 A.D. 926, 139 N.Y.S.2d 883 (1st Dept. 1955).

A motion to dismiss a declaratory judgment action before answer presents for determination *only* the question whether a case for a declaratory judgment is made out, not the question of whether a plaintiff is entitled to an adjudication in his favor. *Law Research Service, Inc. v. Honeywell, Inc.*, 31 A.D.2d 900, 298 N.Y.S.2d 1 (1st Dept. 1969); *Staver Co. v. Skrobisch*, 144 A.D.2d 449, 533 N.Y.S.2d 967 (2nd Dept.

1988), *app dismd without op*, 74 N.Y.2d 791, 545 N.Y.S.2d 106, 543 N.E.2d 749.

All material facts and circumstances should be fully developed before the respective rights of the parties may be adjudicated in a declaratory judgment action. *Commerce & Industry Ins. Co. v. Sciales*, 132 A.D.2d 516, 517 N.Y.S.2d 258 (2nd Dept 1987), *app. dismd. without op.* 70 N.Y.2d 797, 522 N.Y.S.2d 114, 516 N.E.2d 1227.

It is therefore error to dismiss a complaint in an action for a declaratory judgment because the plaintiff, on the merits, is not entitled to the declaration sought. *St. Lawrence University v. Trustees of Theological School of St. Lawrence University*, 20 N.Y.2d 317, 282 N.Y.S.2d 746, 229 N.E.2d 431 (1967).

On such a motion, the complaint is to be liberally construed and deemed to allege whatever can be reasonably implied from its factual statements. *Hallock v. State*, 39 A.D.2d 172, 332 N.Y.S.2d 762 (3d Dept 1972), *aff'd*, 32 N.Y.2d 599, 347 N.Y.S.2d 60, 300 N.E.2d 430, 908.

II. MATERIAL QUESTIONS OF FACT EXISTED WITH RESPECT TO THE TELEPHONE CALLS AT ISSUE AND THE INTENT OF THE PARTIES IN DRAFTING THE AMBIGUOUS LANGUAGE OF THE SETTLEMENT AGREEMENT/RELEASE.

In reaching the determination that respondent's fiduciary duty was not breached, first, the appellate court found that it was un-controverted the breaches alleged were mere inquiries unaccompanied by any compulsion. It is however, respectfully submitted that the court could not have properly

made such a finding because the purpose of Appellant seeking the deposition in the first action was to find out exactly what had specifically transpired during those telephone calls. R at 61-69. Appellant fervently believed Respondent's accounting of the events was not factually accurate and that is why his deposition was being sought.

Appellant had no way of knowing whether demands had been made by the callers or others to disclose the terms of the confidential agreement. Yet the appellate court stated as fact that it was undisputed the breaches involved were mere inquiries.

The appellate court also found that the trial court was correct in determining that any claims of breach would be barred by the settlement agreement/release. The language in the settlement agreement required Respondent to provide notice to Petitioner of "any kind of all attempts to compel disclosure" of the terms of settlement." R at 135. Before the trial court could have issued a declaratory judgment, it would first have to determine the intent of both the parties in using this language. Moreover, before the trial court could issue the declaratory judgment, it would also have to know exactly what transpired during the telephone conversations. The only fair way for it to make such a determination was for the court to permit Appellant to engage in discovery to find out what was said, rather than relying solely on the unsigned proposed affidavit of Respondent.

Respondent obviously believed the information sought by the two callers related to the settlement agreement as he indicated to both of them that he actually read language from the settlement agreement. *See* Respondent's brief in Docket No. 2000-07594 at p. 12 where Respondent asserts

"Both [of the callers] were satisfied with the settlement language and the assertion of the attorney-client privilege".

The granting of the permanent injunction pertaining to the Respondent's continuing ethical responsibilities certainly shows the contemplation on the part of the parties that the Respondent would continue to have fiduciary duties owed even after execution of the settlement agreement.

The disputed language could not simply be taken in a vacuum because the express written obligation of the Respondent was also to provide documentation relating to the Respondent's contact with the Church of Scientology, the business entity whose agents had made the calls to Respondent. R at 135-138.

Thus, the trial court could not properly determine what the parties had intended solely from reading the language in the agreement because the language "any kind of all attempts to compel disclosure" was ambiguous at best.

If the Respondent were trying to dismiss the complaint by motion for summary judgment, he would have to meet his burden of establishing that the construction which he seeks to put upon the words of the contract is the only construction which can fairly be placed thereon. *Posner v. United States Fidelity & Guaranty Co.*, 33 Misc. 2d 653, 226 N.Y.S.2d 1011 (1962), *aff'd*, (3d Dept) 16 A.D.2d 1013, 229 N.Y.S.2d 160.

Because Respondent would fail in his endeavors, the Court could not have simply determined the issue of the Respondent's duty under the settlement agreement in the fashion it employed.

The court believed that the release also barred the action. R at 5. Yet the acts alleged which were the subject of the declaratory relief action all occurred after execution of the release. R at 126-127, 130-131. Questions of fact pertaining to the intent of the parties in executing the release also existed which would have precluded the granting of the motion to dismiss.

A release bars suits on causes of action arising prior to the date of their execution, but a release will not bar subsequent claims unless they are specifically embraced within the release, or they fall within the fair import of its terms. *Murray-Gardner Management, Inc. v. Iroquois Gas Transmission System, L.P.*, 229 A.D.2d 852, 646 N.Y.S.2d 418 (3d Dept 1996).

Courts will look behind the release when an issue is raised with respect what the parties intended to release. *Pascoe v. Electromatic Mfg. Corp.*, 3 A.D.2d 818, 161 N.Y.S.2d 365 (1st Dep't 1957); *Meil v. Syracuse Construction, Inc.*, 42 Misc. 2d 39, 247 N.Y.S.2d 541 (Sup. Ct. 1964).

Thus, when there is a question of fact as to the scope of a release and the intent of the party, summary judgment will be precluded. *Green v. Lake Placid 1980 Olympic Games, Inc.*, 147 A.D.2d 860, 538 N.Y.S.2d 82 (3d Dept 1989)

As such, to the extent the trial and appellate courts were relying upon the release as a basis for "cutting off the duty", before such a determination could be made, the court would have had to ascertain the intent of both parties.

A determination by Judge Colabella as to what the parties meant by putting this language in the agreement simply could not be adequately or properly performed based upon the mere reading of the agreement. While the Respondent may cite one way to interpret the agreement, Appellant's understanding of the language in dispute is certainly reasonable. Most importantly, until discovery was conducted so that Petitioner could find out what was said, there is no way to tell that the callers did not seek to compel the information.

III. DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO BE HEARD AND PRESENT ONE'S CASE.

The core of due process rights is the right to notice and a meaningful opportunity to be heard. *Richards v. Jefferson County*, 116 S. Ct. 1761, 517 U.S. 793, 135 L. Ed. 2d 76 (1996), *on remand*, 682 So. 2d 409, subsequent mandamus proceeding *Ex parte Jefferson County*, 710 So.2d 908.

A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful. *City of West Covina v. Perkins* 119 S. Ct. 678, 525 U.S. 234, 142 L. Ed. 2d 636 (1999), *on remand*, 167 F.3d 1286.

An essential principal of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 470 U.S. 532. 84 L. Ed. 2d 494 (1995), *on remand*, 651 F. Supp. 92, *affirmed*, 844 F.2d 304, *certiorari denied*, 109 S. Ct. 363. 488 U.S. 941, 102 L. Ed. 2d 353, *certiorari denied*, 109 S. Ct. 377, 488 U.S. 946, 102 L. Ed. 2d 365.

The guaranty of due process applies to the judicial branch as well as the legislative, executive, and administrative branches of government. *Brinkerhoff-Faris Trust & Savs. Co. Hill*, 281 U.S. 673, 680, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

The opportunity to be heard is an essential requisite of due process of law *in judicial proceedings*. *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 517 U.S. 793, 135 L. Ed. 2d 76 1996), *on remand*, 682 So.2d 409, subsequent mandamus proceeding *Ex Parte Jefferson County*, 710 So.2d 908.

The constitutional due process requirement of "some kind of hearing" means, at a minimum, that the affected individual must have a meaningful opportunity to present his case before a neutral decision maker. *See Ropert v. District of Columbia*, 292 U.S. App. D.C. 219, 948 F.2d 1327 (1991), citing *Fuentes v. Shevin*, 407 U.S. 67, 83, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).

It is respectfully submitted that Petitioner did not have a meaningful opportunity to present its case. Both the trial and appellate court made findings that certain facts were un-controverted even though Petitioner directly controverted them. The trial court would not even permit Petitioner the opportunity to conduct discovery to ascertain the truth.

When there are no factual issues to resolve, the due process clause does not require a hearing. *Air North America v. Department of Transportation*, 937 F.2d 1427 (9th Cir. 1991); *McCachren v. United States Department of Agriculture*, 599 F.2d 655, 656-57 (5th Cir. 1979).

The corollary must also be true that where there are factual issues to be resolved, the due process clause does in fact require a hearing.

As the Tenth Circuit court noted in *De La Llana-Castellon v. Immigration and Naturalization Service*, 16 F.3d 1093 (10th Cir. 1994), in an adjudicative process:

> The fundamental requirement of due process is the opportunity to be heard at "a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In the adjudicative context, due process entitles a person to fact finding based on a record produced before the decision maker and disclosed to that person, *see Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), and an individualized determination of his interests, *see Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1943 (1993). Finally, it requires that the decisionmaker actually consider the evidence and argument that a party presents. *See Morgan v. United States*, 298 U.S. 468, 481 (1936).

De La Llana-Castellon v. Immigration and Naturalization Service, 16 F.3d at 1096 (10th Cir. 1994).

In the instant matter, the court did not properly consider the evidence because the court would not permit Petitioner the right to even collect the evidence. How can a court properly say that there was no attempt to compel the information when Petitioner is not permitted discovery to find out the nature and extent of the conversations in question?

IV. DISMISSAL OF THE CASE BEFORE IT WAS AT ISSUE DEPRIVED APPELLANT OF ITS CONSTITUTIONAL PROTECTIONS.

At least with a summary judgment motion, procedural protections of due process rights exist to make sure a litigant gets a fair adjudication of the dispute. In the instant matter, the trial court's action was much worse than the improper granting of a motion for summary judgment.

The case was not even at issue and Appellant was not given the right to conduct *any* discovery. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) this Court noted that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of its evidence.

In *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546 (7th Cir. 1999), the court, in relying upon *Celotex* found that the imposition of summary judgment sua sponte was nevertheless improper because the court did not provide the party a meaningful opportunity to come forward with all of her evidence.

It is respectfully submitted that it is a deprivation of due process to require Petitioner to come forward with all of its evidence before Petitioner is given the opportunity to obtain that evidence through discovery.

In *National Presto Industries, Inc. v. West Bend Company*, 76 F.3d 1185 (1996) the court noted that the trial court has authority to dispose of issues summarily when the requirements of Rule 56 are met, provided that the adversely

affected party has an adequate opportunity to respond *and the summary procedure does not deny due and fair process.*

A court cannot enter a summary judgment without notifying the parties of its intentions or allowing them an opportunity to cure or respond. *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993). Since "the opportunity to respond is deeply embedded in our concept of fair play and substantial justice," making such a ruling sua sponte without notice or an opportunity to respond violates the due process rights of the adverse party. *Id.* at 437; *Divane v. Krull Electric Co.*, 194 F.3d 845 (1999).

In order to prevent the harsh rule that a party cannot respond to a motion for summary judgment because more discovery is needed, a litigant's right to discovery is fully protected by Fed. R. Civ. P. 56(f), which allows a court to refuse summary judgment if a litigant shows, "by affidavit," that additional discovery is necessary to uncover–"facts essential to justify his position." *Avia Group International, Inc., (Formerly Pensa, Inc.) v. L.a. Gear California, Inc.*, 853 F.2d 1557 (1988).

Thus, the *Avia Group* Court noted that there are ample due process safeguards available in the summary judgment procedures of Rule 56, such as Fed. R. Civ. P. 56(f). This rule permits the court to refuse the application for judgment or order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other orders as are just where a non-movant cannot present facts essential to his opposition through affidavit.

Courts may even enter summary judgment in favor of the non-movant. *See, e.g., Massey v. Del Laboratories, Inc.*,

118 F.3d 1568 (1997). However, as that case notes, the factual record must have been well developed before the summary judgment stage.

V. WHILE SUMMARY JUDGMENTS ARE AVAILABLE IN DECLARATORY JUDGMENT ACTIONS, THEY ARE INAPPROPRIATE WHERE MATERIAL ISSUES OF FACT REMAIN.

Motions for summary judgment are available in declaratory judgment actions. If there are no factual issues presented by the pleadings or the facts are undisputed, then the court may award partial or complete summary judgment. *See, e.g., Goodwill Advertising Co. v. State Liquor Authority*, 40 Misc. 2d 886, 244 N.Y.S.2d 322 (Sup. Ct. 1962), *aff'd*, 19 A.D.2d 928, 244 N.Y.S.2d 640 (3d Dept 1963).

Where an adjudication declaring and enforcing the plaintiff's alleged rights depends upon the substantiation of material allegations which purport to be in bona fide dispute, summary judgment *should not* be granted and the case should proceed to trial. *Hallock v. State*, 39 A.D.2d 172, 332 N.Y.S.2d 762 (3d Dept 1972), *aff'd*, 32 N.Y.2d 599, 347 N.Y.S.2d 60, 300 N.E.2d 430.

If there are no factual issues in dispute, a court may treat a motion to dismiss as a motion for summary judgment. *Sysco Corp. v. Hempstead*, 133 A.D.2d 751, 520 N.Y.S.2d 40 (2nd Dept 1987). Thus, a dismissal however, should not be maintained where there remain unresolved issues of fact. *Nadel v. Costa*, 91 A.D.2d 976, 457 N.Y.S.2d 345 (2nd Dept 1983).

Where the facts presented on the pleadings or on a pretrial motion are not sufficient to permit a declaration for either party, the case should proceed to trial. *See Wolff v. 969 Park Corp.*, 86 A.D.2d 519, 445 N.Y.S.2d 756 (1st Dept 1982) (in a declaratory judgment action, the material facts and circumstances should be fully developed before the rights of the parties are adjudicated.)

In the instant matter, because material questions of facts existed, Appellant was denied its due process rights when declaratory judgment was entered against it before the case was at issue and the court deprived Appellant of the right to conduct discovery.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

MICHAEL SPIEGEL
Attorney for Petitioner
4221 Wilshire Boulevard
Suite 395
Los Angeles, CA 90010
(323) 964-9050

APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, STATE OF NEW YORK FOR THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED JUNE 3, 2002

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

0669f
O/mv

Argued — June 3, 2002

AD2d

FRED T. SANTUCCI, J.P.
MYRIAM J. ALTMAN
ANITA R. FLORIO
SONDRA MILLER, JJ.

2000-11709

Peter Letterese & Associates, Inc., appellant,
v Daniel Dashman, respondent.

(Index No. 12211/00)

DECISION & ORDER

In an action, inter alia, for a judgment declaring that the defendant breached his fiduciary obligation to the plaintiff, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County

(Colabella, J.), dated December 1, 2000, as granted the defendant's motion to dismiss the complaint, to impose sanctions and costs against it and its attorney, and to enjoin it and/or its agents from commencing any further actions against the defendant with respect to the claims in this action and a prior related action.

ORDERED that the order is affirmed insofar as appealed from, with costs, and the matter is remitted to the Supreme Court, Westchester County, for the entry of a judgment declaring that the defendant did not breach his fiduciary duty to the plaintiff.

The Supreme Court properly granted that branch of the defendant's motion which was to dismiss the complaint. The complaint alleged, inter alia, that the defendant breached an ethical obligation arising as a result of the parties' prior attorney-client relationship and/or imposed under a prior release and settlement agreement that resolved several prior actions between the parties pending in various state and federal courts. However, the settlement required the defendant to report to the plaintiff any attempt by a third party to "compel" disclosure of specified information, and it is uncontroverted that the breaches alleged herein involved mere inquiries, unaccompanied by any compulsion. Furthermore, insofar as the complaint alleged a breach of the attorney-client relationship, any such claims are barred by the release. We note, however, that the Supreme Court erred insofar as it relied upon the doctrine of collateral estoppel, as the dismissal of the earlier action did not necessarily decide the issues raised herein.

Appendix A

The Supreme Court also correctly assessed sanctions and costs against the plaintiff and his attorney, as this action, much like the related action that the Supreme Court previously dismissed *(see Letterese v Dashman*, 289 AD2d 378), is frivolous.

The plaintiff's remaining contentions are without merit.

We note that since this is a declaratory judgment action, the Supreme Court should have directed the entry of a judgment declaring that the defendant did not breach his fiduciary duty to the plaintiff (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed*, 371 US 74, *cert denied* 371 US 901).

SANTUCCI, J.P., ALTMAN, FLORIO and S. MILLER, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX B — DECISION, ORDER, AND JUDGMENT APPEALED FROM OF THE SUPREME COURT, STATE OF NEW YORK, COUNTY OF WESTCHESTER DATED DECEMBER 1, 2000

DECISION/ORDER/JUDGMENT APPEALED FROM

INDEX NO.
12211/00

MOTION DATE
11/17/00
(2 motions)
D

SUPREME COURT : STATE OF NEW YORK

COUNTY OF WESTCHESTER

PRESENT: HON. NICHOLAS COLABELLA
J.S.C.

PETER LETTERESE AND ASSOCIATES, INC.,

Plaintiff,

- against -

DANIEL DASHMAN,

Defendant.

Appendix B

DECISION/ORDER/JUDGMENT

The following papers numbered 1-43 and 1-15 were read on this motion by defendant to dismiss and for sanctions and injunctive relief; motion by defendant for a protective Order.

* * *

Defendant moves to dismiss and for sanctions and injunctive relief. Motion is determined, as follows:

Motion insofar as it seeks to dismiss is granted. Plaintiff seeks a declaration that defendant breached a fiduciary obligation to inform it of a potential business opportunity and in connection therewith has sought a deposition of defendant. Plaintiff made the same claim and sought the identical relief by way of motion in the related action *Letterese, et al., v. Dashman*, index # 10892/99. The undersigned rejected the application by Order dated July 25, 2000 on both procedural and substantive grounds and granted a cross-motion by defendant for sanctions to the extent plaintiff was sanctioned $750.

Ruling as to procedure, the Court held the application had nothing to do with the parties' settlement of the action or the limited scope of the judgment. The Court found the request for a deposition was nothing more than a fishing expedition to discover other suspected, but presently unknown, transgressions by defendant.

Appendix B

Ruling on the substance of the request, the Court stated the following:

"The specific incident that is the springboard for plaintiffs' request, an inquiry into ownership of certain copyrights, is itself patently specious. Plaintiffs have failed to cite any ethical canon or rule to support their claim that defendant had an obligation, in the absence of an ongoing attorney-client relationship, to inform plaintiffs of a potential business opportunity. Further, such an obligation is inconsistent with the terms of the parties' settlement agreement in which the parties specifically released each other from prior "obligations, promises, agreements" except as set forth in the settlement agreement."

Ruling as to sanctions, the Court held that the motion to compel defendant's deposition was frivolous as that term is defined in 22 NYCRR section 130-1.1(c)(1) in that it was completely without merit and could not be supported by a reasonable argument for the extension, modification or reversal of existing law. The Court further noted that the lack of merit to plaintiff's position raised a question as to whether the application by plaintiff was frivolous under the alternative definition in 22 NYCRR section 130-1.1(c)(2) as conduct undertaken to harass or maliciously injure another.

The foregoing makes clear that the determination in the prior action was both on the merits and necessary to the decision. Plaintiff had placed the defendant's conduct in controversy in the prior action in choosing to litigate it in that action. Defendant did likewise in moving for sanctions against plaintiff. Both sides, in turn, responded to each other's

assertions. Plaintiff cannot he heard now to complain that the Court addressed what the parties requested it to address. That determination forecloses relitigation of the same issues in this action. Plaintiff's sole and exclusive remedy is to appeal the July 25, 2000 Order in the prior action which plaintiff alleges it has done.[1]

Motion insofar as it seeks sanctions is granted pursuant to 22 NYCRR Part 130-1 to the extent plaintiff is sanctioned $5,000 which shall be deposited with the County Clerk for transmittal to the Commissioner of Taxation and Finance (see, 22 NYCRR section 130-1.3). Plaintiff's attorney, Richard Marcus, Esq., is sanctioned $5000 which shall be paid to the Lawyers Fund for Client Protection. The award of sanctions shall be entered as a Judgment of the Court (see, 22 NYCRR section 130-1.2). Proof of payment shall be filed with the Court and served on defendant no later than January 5, 2001.

Plaintiff's election to relitigate previously determined issues in a new action constitutes "frivolous" conduct as that term is defined in 22 NYCRR section 130-1.1(c)(1) in that "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. "By a parity of reasoning, the relitigation of plaintiff's claim in the face of the July 25, 2000 Order warrants an adverse inference against plaintiff. The Court finds such conduct "frivolous" as defined in

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1. Plaintiff could also have sought leave to reargue before the undersigned under CPLR 2221, but such application had to have been made within the time to take the appeal and was never made.

22 NYCRR section 130-1.1(c)(2) as conduct undertaken primarily to "harass or maliciously injure another".

In determining the appropriate remedy for the conduct at bar, the Court has considered the fact that defendant has acted *pro se*. The Court declines, in the circumstances at bar, to award a counsel fee where none, in fact, has been incurred by defendant. However, 22 NYCRR section 130-1.1(a) permits, in the alternative, the imposition of a monetary sanction upon a party or attorney who engages in frivolous conduct. The Court finds that such a sanction is appropriate in this case against both plaintiff and its attorney. Plaintiff knew or should have known, with the advice of counsel, that there was no basis for this litigation. Plaintiff's counsel also knew or should have known that there was no basis for this litigation, yet chose to bring it anyway.

The conduct of plaintiff's counsel in other respects bears comment as well. Counsel improperly refused to communicate with defendant's duly authorized attorney despite defendant's confirmation of the attorney's authority [see, exhibits 12, 13, 15, 19 & 21 to motion to dismiss). Counsel improperly threatened defendant with unspecified action for alleged legal malpractice, despite the absence of an ongoing attorney-client relationship, based solely on his opposition to a motion in an appeal to which he is a respondent [see, exhibit 29 to motion to dismiss].[2] Counsel improperly engaged in invective against defendant which is

2. The motion was denied by the Appellate Division (see, Order dated October 31, 2000 annexed as exhibit 41 to defendant's Reply Affidavit on the motion for protective Order).

conduct unbecoming to an attorney [see, e.g., reference to defendant's "stupidity" in seeking sanctions in plaintiff's memorandum in opposition to motion to dismiss, p.10]. Counsel improperly listed another attorney as the attorney of record on the notice of appeal in the prior action [see, exhibits 15 and 31 to motion to dismiss]. Counsel improperly filed inaccurate affirmations of service with respect to the appeal [see exhibits 16 - 17 and 26 - 27 to motion to dismiss]. Counsel improperly served a notice of deposition on defendant, without leave of Court, prior to the expiration of his time to answer (see, CPLR section 3106).[3]

The circumstances at bar warrant a more onerous sanction than that imposed in the prior action in order to prevent further abuse of the judicial process. In the prior case, the undersigned gave plaintiff the benefit of the doubt and imposed a relatively minor award in the hope that such an award would be sufficient to deter future frivolous conduct by plaintiff. The Court also gave plaintiff's counsel the benefit of the doubt in imposing sanctions on plaintiff,

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3. Plaintiff's counsel alleges that he served the notice on October 11 in the belief that defendant had defaulted because he had not received defendant's answer. He alleges he first learned of the motion to dismiss when he spoke the Court Clerk on October 13, 2000 and that he did not actually receive the motion at his home in California until October 16, 2000. Counsel, however, does not dispute that defendant, in fact, timely served the motion to dismiss on October 6, 2000 and that the papers were delivered to the New York address he provided for service before the time to answer had expired (see, Affidavit of Richard Marcus, Esq. in opposition to motion for protective Order]. Upon learning of his error, counsel should have promptly withdrawn the notice.

but not counsel. It is now apparent that the award was insufficient to achieve the desired effect.

In determining the amount to be imposed, the Court has also considered the time defendant has been forced to expend in this matter which he estimates to be in excess of 200 hours. While defendant might have expected to defend an appeal of the July 25, 2000 Order, defendant should not lave had to defend a new plenary action for the same relief as well. The settlement of the prior action was plainly intended to buy peace with plaintiff' and the only window left for future litigation was that specifically set forth in the parties' settlement agreement.[4] The instant litigation contravenes the sprint, if not the letter, of that agreement.

Motion insofar as it seeks injunctive relief is granted. The highly unusual circumstances at bar warrant limited injunctive relief with respect to future litigation (see, *Mancini v. Mancini*, 269 AD2d 366, 367; *Sassower v. Signorelli*, 99 AD2d 358, 359-360; *E. B. Latham & Co. v. Mayflower Industries*, 278 App. Div. 90, 94; *Quinlan v. Lender*, 102 Misc2d 127; see generally 67 NY Jurisprudence 2nd Injunctions, section 120). Plaintiff and/or its agents are enjoined from commencing any further actions against defendant with respect to the claims in this action or the claims in the prior action under index # 10892/99 except as provided in the parties' stipulation of settlement. This injunction is made subject to the appeal in the prior action and does not extend to new claims against defendant unrelated to and arising after the parties' settlement.

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4. See settlement agreement, par. 3, p. 4 and par. 12, p. 8 [unnumbered exhibit submitted *in camera* by plaintiff].

Appendix B

Defendant separately moves for a protective Order with respect to the notice to take his deposition is granted. Motion is denied as academic light of the dismissal of the action.

At the parties' request, the settlement agreement submitted for *in camera* review herein by plaintiff shall be sealed.[5]

Dated: White Plains, New York
12-1-2000

s/ Nicholas Colabella
Nicholas Colabella
Supreme Court Justice

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5. Contrary to the statement of plaintiff's counsel [see, memorandum in opposition to motion to dismiss, pp. 2-3], this same document was previously submitted and considered by the Court in the prior action.

APPENDIX C — DECISION AND ORDER APPEALED FROM OF THE SUPREME COURT, STATE OF NEW YORK, COUNTY OF WESTCHESTER DATED JULY 25, 2000

DECISION AND ORDER APPEALED FROM, DATED JULY 25, 2000[4-6]

INDEX NO.
10892/99

MOTION DATE
6/30/00
D

SUPREME COURT : STATE OF NEW YORK

COUNTY OF WESTCHESTER

PRESENT: HON. NICHOLAS COLABELLA
J.S.C.

PETER LETTERESE, BARBARA LETTERESE, & PETER LETTERESE & ASSOCIATES, INC.,

Plaintiffs,

- against -

DANIEL DASHMAN,

Defendant.

Appendix C

DECISION/ORDER

The following papers numbered 1-25 were read on this motion by plaintiffs to compel deposition; cross-motion by defendant for a protective Order and sanctions.

* * *

Motion is denied. The Judgment dated September 29, 1999 provided that defendant would not divulge confidential information arising from the attorney-client relationship between the parties in 1992 to 1997 without demonstrating to the Court that the information to be divulged was "necessary to establish or collect his fee or to defend (defendant) or his employees against an accusation of wrongful conduct." The deposition plaintiffs now seek has nothing to do with the foregoing. Defendant does not seek to divulge otherwise confidential information and has not sought a judicial determination that such disclosure is necessary for the reasons stated in the Judgment. Nor is there any allegation that defendant has breached the terms of the Judgment by disclosing confidential Information.

Cross-motion insofar as it seeks a protective Order is denied as academic. Plaintiffs' notice of motion is not equivalent to a discovery notice. Therefore, there is no need for a protective Order.

Cross-motion insofar as it seeks sanctions is granted to the extent that plaintiffs shall deposit $750 with the County Clerk for transmittal to the Commissioner of Taxation and Finance (see, 22 NYCRR section 130-1.3). Plaintiffs shall

file proof of payment with the Court by August 31, 2000. The motion to compel defendant's deposition constitutes "frivolous" conduct as defined in 22 NYCRR Part 130-1(c)(1) in that "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."[1]

As discussed above, the relief sought does not fall within the limited scope of the Judgment. In fact, plaintiffs concede as much in stating that the instant dispute has nothing to do with the settlement underlying the Judgment.[2] The proposed deposition also amounts to nothing more than a fishing expedition. According to plaintiffs, they seek to depose defendant, not with respect to the specific instance of misconduct alleged, but to "discover the other ways in which the defendant failed to act as an ethical attorney is required to."[3]

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1. Plaintiffs' counsel contends, *inter alia* that the motion cannot be considered frivolous as the Court granted leave to make the motion. Such permission, however, does not foreclose the imposition of sanctions at this time. Permission was given based on the Court's understanding that it related to the Judgment, and prior to any opportunity for defendant to be heard and prior to any assessment by the Court of the merits of the application.

2. See, plaintiffs' memorandum in reply, pp. 2-3. The Court retained jurisdiction in the Judgment for the limited purpose of enforcing the Judgment which was based on the parties' stipulation. The action was otherwise dismissed.

3. See, June 17, 2000 Letterese affidavit, pars. 11 & 12.

Appendix C

The specific incident that is the springboard for plaintiffs' request, an inquiry into ownership of certain copyrights, is itself patently specious. Plaintiffs have failed ~~to cite~~ any ethical canon or rule to support their claim that defendant had an obligation, in the absence of an ongoing attorney-client relationship, to inform plaintiffs of a potential business opportunity. Further, such an obligation is inconsistent with the terms of the parties' settlement agreement in which the parties specifically released each other from prior "obligations, promises, agreements" except as set forth in the settlement agreement.[4]

The amount imposed as a sanction is, in the view of the undersigned, the minimum necessary to deter future frivolous conduct by plaintiff. The Court declines to award attorney's fees to defendant, in the exercise of discretion, given that he has appeared pro se, but does not foreclose such a request with respect to future conduct.

At the parties' request, the opposition papers filed by defendant shall be sealed.

Dated: White Plains, New York
7-25-2000

s/ Nicholas Colabella
Nicholas Colabella
Supreme Court Justice

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4. The lack of merit to plaintiffs' position also raises a question as to whether the subject application is "frivolous" as defined in 22 NYCRR section 130-1(c)(2) as conduct undertaken to "harass or maliciously injure another."

APPENDIX D — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL DATED NOVEMBER 21, 2002

STATE OF NEW YORK, COURT OF APPEALS

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 934

Peter Letterese & Associates, Inc.,

Appellant,

v.

Daniel Dashman,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court